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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-499

David Eugene Rogers..... *Petitioner*

Vs.

State of Arkansas..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 258 Ark. 314, 524 S.W. 2d 227 (1975), and is printed as Appendix "A" to Petitioner's Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the jury instructions given at Petitioner's trial were so vague so as to offend the due process clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

RULE 13, UNIFORM RULES FOR CIRCUIT AND CHANCERY COURTS, ARK. STAT. ANN., VOL. 3A, SUPP. 1973, p. 126.

"OBJECTIONS TO JURY INSTRUCTIONS"

"No party may assign as error the giving or the failure to give an instruction to a jury unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of

his objection. The trial judge shall give all parties an opportunity to make objections to instructions out of the hearing of the jury.

"A mere general objection shall not be sufficient to obtain appellate review of the trial court's actions relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.

"This rule shall apply to any case tried after December 31, 1971."

STATEMENT

The petitioner was found guilty in the Circuit Court of Pulaski County Arkansas of selling a pound of marijuana to an undercover policeman. The petitioner contended that he did not sell the marijuana to the police officer but that someone else did. The petitioner admitted that he was present in the van where the sale took place, but claimed that he had no prior knowledge that the sale was going to take place.

After a trial by jury the petitioner was found guilty and a sentence of eight years with a fine of $4,000.00 was imposed as punishment. At petitioner's trial only a general objection was made to the jury instructions. On appeal to the Arkansas Supreme Court, the petitioner sought review of the instructions but the Arkansas Supreme Court refused to review the instruction because counsel had failed to make a specific objection to it.

ARGUMENT

The issue in this case is whether the jury instructions given at the petitioner's state court trial were so vague as to constitute a denial of a fair and impartial trial as required by the Sixth and Fourteenth Amendments to the Constitution of the United States. The respondent respectfully contends that the jury instruction complained of does not present a substantial federal question, thereby warranting review by this Court. The complained of jury instruction was:

> "The defendant is charged with the offense of delivering a controlled substance, to-wit: Marijuana. Act 590 of 1971 as amended, makes it unlawful for any person to deliver Marijuana, a controlled substance, as defined within the Act.
>
> " 'Deliver' is defined as follows: 'Deliver' or 'delivery' means actual, constructive or attempted transfer from one person to another of a controlled substance in exchange for money or anything of value, whether or not there is an agency relationship."

The petitioner at the trial court level only made a general objection to the instruction.

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

In *Stump* v. *Bennett*, 398 F. 2d 111, 114 (8th Cir. 1968), cert. denied 393 U.S. 1001 (1969), the Court noted that:

> "The fundamental basis of 'due process' relate to adequate notice and reasonable opportunity to be heard. Beyond these minimal standards only oppressive and arbitrary state procedural rules command federal review. Federal intervention is justified only when the state law 'offends some principle of justice so rooted in the traditions and conscience of the our people as to be ranked as fundamental, or frustrates a right 'implicit in the concept of ordered liberty." [Citations omitted.]

The Respondent submits that refusing to review the propriety of a jury instruction given in the language of a statute, especially when only a general objection is made does not offend the due process clause of the Constitution of the United States. The Petitioner seeks to challenge the operation of Rule 13, of the Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A, (Supp. 1973) which is similar in language to Rule 30 of the Federal Rules of Criminal Procedure in that both require specific objections prior to being able to obtain appellate review of jury instructions. The respondent respectfully contends that these rules are not unconstitutional on their face, and, therefore, this Court should grant the requested writ only if the jury instruction itself offends the due process clause.

The respondent contends that giving an instruction in the language of the statute does not amount to error especially when a proper objection is not made. The petitioner objects to the instruction given concerning the meaning of deliver. The instruction was identical to the language contained in Ark. Stat. Ann. § 82-2601(f) (Supp. 1973) which reads:

> "Deliver or delivery means the actual, constructive, or attempted transfer from one person to another of a con-

> trolled substance in exchange for money or anything of value, whether or not there is an agency relationship."

A number of federal courts have held that absent a specific request instructions given in the language of the statute are not reviewable on appeal. In *Tarvestad* v. *United States*, 418 F. 2d 1043, 1048 (8th Cir. 1969), cert. denied 397 U.S. 935 (1970), the Court said:

> "Without a further specific request of definition, the Court's instruction in the language of the statute . . . is sufficient."

The Court in *United States* v. *Robinson*, 448 F. 2d 715 (8th Cir. 1971), cert. denied 405 U.S. 927 (1972) found no error in the failure to define the term "possession" in a sawed-off shotgun case when no request was made nor any objection was made to the trial court's actions. In *Williams* v. *United States*, 328 F. 2d 256, 262 (8th Cir. 1964), the Court noted:

> "Except where the statute is complex or not expressed in ordinary language . . . any amplification which a party may desire to have made must be the subject of a requested instruction by him."

The jury instruction in this case was in the language of the statute and was not vague. The trial court was proper in not giving an explanation of the terms used in the statute since it is a well recognized legal principal not to explain the terms of a statute unless requested to do so. The petitioner in this case has failed to show how the instruction prejudiced him and further he failed to specifically object to it at trial. Therefore this Court should not grant the writ since petitioner has failed to show that a substantial federal question exists in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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